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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 PERRY ASHELMAN,

9 Plaintiff,

10 v.

11 STEVE RAMSEY, *et al.*,

12 Defendants.

No. C09-5389 BHS/KLS

ORDER TO AMEND OR SHOW CAUSE

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14 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28  
15 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. The case is before the Court upon review of  
16 Plaintiff's complaint. After reviewing the Complaint and balance of the record, the Court finds  
17 and orders as follows:

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19 **I. DISCUSSION**

20 Under the Prison Litigation Reform Act of 1995, the Court is required to screen  
21 complaints brought by prisoners seeking relief against a governmental entity or officer or  
22 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint  
23 or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that  
24 fail to state a claim upon which relief may be granted, or that seek monetary relief from a  
25 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See  
26 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

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1 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*  
2 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.  
3 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,  
5 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim  
6 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right  
7 to relief above the speculative level, on the assumption that all the allegations in the complaint  
8 are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)(citations omitted).  
9 In other words, failure to present enough facts to state a claim for relief that is plausible on the  
10 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

12 The court must construe the pleading in the light most favorable to plaintiff and resolve  
13 all doubts in plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Although  
14 complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law,  
15 unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the  
16 court can liberally construe plaintiff’s complaint, it cannot supply an essential fact an inmate has  
17 failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673  
18 F.2d 266, 268 (9th Cir. 1982)).

20 Unless it is absolutely clear that amendment would be futile, however, a pro se litigant  
21 must be given the opportunity to amend his complaint to correct any deficiencies. *Noll v.*  
22 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

24 On the basis of these standards, Mr. Ashelman’s allegations appear to fail to state a claim  
25 upon which relief can be granted.

1 Mr. Ashelman claims that on September 3, 2008, he was wrongfully infringed for inciting  
2 a riot with another inmate. Dkt. 1-2, p. 4. He alleges that he was denied the right to obtain  
3 witness statements prior to his infraction hearing and denied a continuance of his infraction  
4 hearing despite the absence of witness statements. *Id.* At the infraction hearing, Mr. Ashelman  
5 was found guilty and sanctioned with 10 days isolation status in IMU and 90 days loss of good  
6 conduct time. Dkt. 1-2, p. 6 and Exhibit C. Mr. Ashelman claims that Defendants violated his  
7 due process rights and constitutional rights by causing him “to be locked down in IMU for an  
8 additional six months” and “causing [him] even a longer more harder sentence because of taking  
9 90 days good time and causing [him] a 2 year tag to keep [him] in closed custody.” *Id.*, p. 8.

11 Mr. Ashelman seeks restoration of his good time, as well as compensatory and punitive  
12 damages. *Id.*, p. 9.

13 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the  
14 defendant must be a person acting under color of state law, (2) and his conduct must have  
15 deprived the plaintiff of rights, privileges or immunities secured by the constitution or laws of  
16 the United States. *Paratt v. Taylor*, 451 U.S. 527, 535 (1981).

18 When a person confined by government is challenging the very fact or duration of his  
19 physical imprisonment, and the relief he seeks will determine that he is or was entitled to  
20 immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ  
21 of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to recover damages  
22 for an alleged unconstitutional conviction or imprisonment, or for other harm caused by actions  
23 whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove  
24 that the conviction or sentence has been reversed on direct appeal, expunged by executive order,  
25 declared invalid by a state tribunal authorized to make such determination, or called into  
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1 question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck v.*  
2 *Humphrey*, 512 U.S. 477, 486-87 (1994).

3 In this case, Mr. Ashelman seeks restoration of his good time. Dkt. 1-2, p. 9. As noted  
4 above, when a state prisoner is challenging the duration of his confinement and the relief he  
5 seeks entails a speedier release from that confinement, his sole federal remedy is a writ of habeas  
6 corpus. *Preiser*, 411 U.S. at 499. A prisoner challenging the denial of good time credits is, in  
7 effect, claiming that his sentence should be shorter. Thus, his sole remedy is habeas corpus.  
8 *Toussaint v. McCarthy*, 801 F.2d 1080, 1096 n. 14 (9<sup>th</sup> Cir. 1986). Therefore, this Court must  
9 construe Mr. Ashelman's challenge of the denial of his good time credits as a habeas petition.  
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11 In addition, prisoners in state custody who wish to challenge the length of their  
12 confinement in federal court by a petition for writ of habeas corpus are first required to exhaust  
13 state judicial remedies, either on direct appeal or through collateral proceedings, by presenting  
14 the highest state court available with a fair opportunity to rule on the merits of each and every  
15 issue they seek to raise in federal court. *See* 28 U.S.C. § 2254(b)(c); *Granberry v. Greer*, 481  
16 U.S. 129, 134 (1987); *Rose v. Lundy*, 455 U.S. 509 (1982); *McNeeley v. Arave*, 842 F.2d 230,  
17 231 (9<sup>th</sup> Cir. 1988).  
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19 State remedies must be exhausted except in unusual circumstances. *Granberry, supra*, at  
20 134. If state remedies have not been exhausted, the district court must dismiss the petition.  
21 *Rose, supra*, at 510; *Guizar v. Estelle*, 843 F.2d 371, 372 (9<sup>th</sup> Cir. 1988). As a dismissal solely  
22 for failure to exhaust is not a dismissal on the merits, *Howard v. Lewis*, 905 F.2d 1318, 1322-23  
23 (9<sup>th</sup> Cir. 1990), it is not a bar to returning to federal court after state remedies have been  
24 exhausted. Because Mr. Ashelman seeks an earlier release from confinement, his action is not  
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1 cognizable under 42 U.S.C. § 1983 and the proper course of action to challenge the denial of his  
2 good time credits is through a habeas corpus petition, which he must first file in state court.

3 Due to the deficiencies described above, the Court will not serve the complaint. Mr.  
4 Ashelman may file an amended complaint curing, if possible, the above noted deficiencies, or  
5 show cause explaining why this matter should not be dismissed no later than **August 7, 2009**. If  
6 Mr. Ashelman chooses to file an amended complaint, which seeks relief cognizable under 42  
7 U.S.C. § 1983, his amended complaint shall consist of a short and plain statement showing that  
8 he is entitled to relief, and he must allege with specificity the following:  
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- 10 1) the names of the persons who caused or personally participated in causing the alleged  
11 deprivation of his constitutional rights;
- 12 2) the dates on which the conduct of each defendant allegedly took place; and
- 13 3) the specific conduct or action Plaintiff alleges is unconstitutional.

14 Mr. Ashelman shall set forth his factual allegations in separately numbered paragraphs.  
15 The amended complaint shall operate as a complete substitute for (rather than a mere supplement  
16 to) the present complaint. Mr. Ashelman shall present his complaint on the form provided by the  
17 Court. The amended complaint must be legibly rewritten or retyped in its entirety, it should be  
18 an original and not a copy, it may not incorporate any part of the original complaint by reference,  
19 and it must be clearly labeled the “First Amended Complaint” and Cause Number C09-5389  
20 BHS/KLS must be written in the caption. Additionally, Plaintiff must submit a copy of the “First  
21 Amended Complaint” for service on each named Defendant.  
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23 If Mr. Ashelman decides that he has no claim for violation of his constitutional rights but  
24 that the relief he seeks is solely related to the restoration of his good time, then he has the option  
25 of filing a writ of habeas corpus. However, he is reminded that before he may file a 2254  
26 petition for writ of habeas corpus in this Court, he must exhaust his state judicial remedies.

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1 If Mr. Ashelman decides to file an amended civil rights complaint in this action, he is  
2 cautioned that if the amended complaint is not timely filed or if he fails to adequately address the  
3 issues raised herein on or before **August 7, 2009**, the Court will recommend dismissal of this  
4 action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike” under  
5 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who  
6 brings three or more civil actions or appeals which are dismissed on grounds they are legally  
7 frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil  
8 action or appeal in forma pauperis “unless the prisoner is under imminent danger of serious  
9 physical injury.” 28 U.S.C. § 1915(g).

11 **The Clerk is directed to send Mr. Ashelman forms for the filing of a 42 U.S.C. 1983**  
12 **civil rights complaint and a 2254 petition for writ of habeas corpus. The Clerk is further**  
13 **directed to send a copy of this Order and a copy of the General Order to Plaintiff.**

15 It is further **ORDERED** that Plaintiff’s Motion for Preliminary Injunction/ Temporary  
16 Restraining Order (Dkt. 7) is **DENIED** as premature as the Court has not yet accepted an  
17 appropriate or sufficient complaint nor has any defendant yet been served. Plaintiff’s Motion to  
18 Amend to substitute a named defendant for the John Doe Defendant in his original complaint  
19 (Dkt. 4) is also **DENIED** as moot. If Mr. Ashelman files an amended civil rights complaint, he  
20 must do so in the manner directed herein.

21 DATED this 15<sup>th</sup> day of July, 2009.

23   
24 Karen L. Strombom  
25 United States Magistrate Judge  
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